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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

WILLIAM T. BRIGHT, ED KING, DEE BARWICK, LOWELL LAWSON, FRANK JORGENSEN and BRIGHT OF AMERICA, INC., a West Virginia corporation,

Petitioners,

v.

QSP, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Petitioners, William T. Bright, Ed King, Dee Barwick, Lowell Lawson, Frank Jorgensen and Bright of America, Inc. (collectively "BOA") have filed a petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit") in this case. The Fourth Circuit overturned a jury verdict rendered in favor of BOA. Respondent, QSP, Inc. ("QSP") has filed a brief in opposition to BOA's petition for a writ of certiorari.

In its brief, QSP, again, as it did in the court below, confuses other causes of action in the case with unjust enrichment, and virtually ignores the limitations imposed upon reviewing courts by the Seventh Amendment. Moreover, QSP asserts that uniformity exists among the circuits applying new Rule 50, when, in fact, no such uniformity was created by the new Rule. This case, and others pending before the Court, reveal that the time is ripe for this Court to address, and enforce, the Seventh Amendment's protection of a jury's factual conclusions.

I. THE FOURTH CIRCUIT IGNORED THE LIMITATIONS OF THE SEVENTH AMENDMENT AND RULE 50 OF THE FEDERAL RULES OF CIVIL PROCEDURE BY REEXAMINING FACTS FULLY CONTESTED BEFORE A JURY.

BOA in its petition pointed out specific examples where the Fourth Circuit improperly reexamined facts that had been decided by the jury. Pet., pp. 5-6. Although stating that it was reviewing the evidence in a light most favorable to BOA, the Fourth Circuit majority rejected the jury verdict, basing its opinion on facts that were actually contrary to direct testimony and evidence presented by BOA at trial. *See* Pet. at p. 6; App. 11a, 13a, 29a-33a. In its response, QSP simplistically argues that the Fourth Circuit applied the correct standard of appellate review (while not addressing the specific instances pointed out by BOA where the Fourth Circuit improperly evaluated facts), and that the majority did not violate the Seventh Amendment. Br. in Opp., pp. 6-8.

This Court has held that "[a]ppellate review in the federal courts is, of course, limited ultimately by the Seventh Amendment." *Lumbermen's Mut. Cas. Co. v. Elbert*, 348 U.S. 48, 53 (1954). In *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913), the Court pointed out that the aim of the Seventh Amendment "is not to preserve mere matters of form and procedure, but substance of right. This requires that questions of fact in common law actions shall be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative. . . ." 228 U.S. at 378. The Court also explained that:

> In the trial by jury, the right to which is secured by the Seventh Amendment, both the court and the jury are essential factors. To the former is committed a power of discretion and superintendence, and to the latter the ultimate determination of the issues of fact. Only through the co-operation of the two, each acting within its appropriate sphere, can the constitutional right be satisfied. And so, to dis-

> pense with either, or to permit one to disregard the province of the other, is to impinge on that right.

228 U.S. at 383.

QSP underestimates the scope and mandate of the Seventh Amendment when it argues that BOA has no such constitutional claim. After all, the Fourth Circuit majority, reiterated by QSP, ignored direct testimony favoring BOA while relying on contradictory testimony from QSP officers that the jury did not believe. For example, in its reply, QSP, tracking the Fourth Circuit majority's reexamination of facts, erroneously divorces the Allegro contract from the joint venture and draws a dichotomy where none ever factually existed. Despite QSP's protests to the contrary, the evidence read in the light most favorable to BOA supported a finding that there was a connection between the joint venture and the assumption of the Allegro contract. Likewise, there was no unrequested performance or enhancement of services by BOA as the testimony aptly demonstrated. QSP's statement and the majority's finding that "BOA received the benefits" (Br. in Opp., p. 3) was directly contradicted at trial by the jury's finding that QSP was unjustly enriched by $2,000,000. Any finding to the contrary is nothing more than a reexamination of facts already found by the jury, as Judge Butzner's dissent correctly observed.

Moreover, QSP, like the appellate court's majority, confuses the jury's findings regarding promissory estoppel and fraud with the jury's findings regarding the separate and distinct theory of unjust enrichment. Since the jury was separately charged on the elements of unjust enrichment, it is a violation of Rule 50 and the Seventh Amendment to look to other liability theories in search of factual support for the legal theory under review. Unjust enrichment was separately charged by the district court and both QSP and the majority completely ignore the charge. This is highlighted by QSP's statements in its reply that because the jury had found for QSP on the promissory estoppel and fraud claims, "BOA assumed the Allegro contract at its own business risk. . ." Br. in Opp., at p. 5.

In so arguing, QSP and the majority failed to give the proper deference to the appropriate findings of the jury. This failure is a violation of the Seventh Amendment and the language and intent of Rule 50 of the Federal Rules of Civil Procedure.

II. A SPLIT EXISTS IN THE STANDARDS USED BY THE CIRCUIT COURTS OF APPEALS IN REVIEWING A DISTRICT COURT'S DENIAL OF A MOTION FOR JUDGMENT AS A MATTER OF LAW.

QSP argues that "Rule 50(a)(1), as amended in 1991, now sets forth a uniform standard that a judgment as a matter of law shall be granted if 'there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.' " Br. in Opp., p. 9.

In fact, the Committee Note to Amendments of 1991 to Rule 50 states that:

> Paragraph (a)(1) articulates the standard for the granting of a motion for judgment as a matter of law. It effects no change in the existing standard. That existing standard was not expressed in the formal rule, but was articulated in long-standing case law.

Thus, there is no new "uniform standard" for the grant of judgment as a matter of law; the problem is the variety of approaches used by the circuits prior to, and since, the amendments to Rule 50.

For instance, the Third Circuit case cited by QSP for that proposition states that in reviewing a district court's denial of a motion for judgment n.o.v., the court "view(s) *all of the evidence* and inferences drawn therefrom in the light most favorable to the party with the verdict. . . ." *Cassidy Podell Lynch, Inc. v. Snydergeneral Corp.*, 944 F.2d 1131, 1137 (3rd Cir. 1991) (emphasis added). On the other hand, the Eighth Circuit case cited in QSP's brief maintains that *"only evidence favoring the non-moving party* should be considered in ruling upon a motion for judgment n.o.v." *Caudill v. Farmland Indus. Inc.*, 919 F.2d 83, 86 (8th Cir. 1990) (emphasis added).

These two cases further illustrate BOA's contention that there is no uniform standard among the courts of appeals for determining the legal sufficiency of evidence that supports a jury verdict, and the Fourth Circuit's new "materiality" standard only worsens this situation.

Other cases pending before this Court illustrate the ubiquitous nature of the problem. BOA, after filing its petition, learned of the petition in *W. R. Grace and Co. v. MDU Resources Group d/b/a Montana Dakota Utilities Co.*, 14 F.3d 1274 (8th Cir. 1994) *petition for cert. filed* No. 93-2058 (U.S. June 22, 1994). That petition raises the same Seventh Amendment issues pending herein and cites (at page 16) among other sources, Eric Schnapper's discussion of the problem of judicial "superjurors" and the absence of any consideration by this Court since the early 1960's of similar issues. Schnapper, *Judges Against Juries, Appellate Review of Federal Jury Verdicts*, 1989 Wisc. L. Rev. 237 (1989).

These cases, and the commentators, underscore the lack of a uniform standard in following the Seventh Amendment's proscriptions and the need for this Court to consider the issue.

CONCLUSION

For all of the reasons set forth in the original petition and this reply brief, the petition for writ of certiorari should be granted.

Respectfully submitted,

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